

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Residential Building  
Contractor's License of Schuett  
General Contractors, Inc., License No.  
20221427

**FINDINGS OF FACT,  
CONCLUSIONS AND ORDER  
FOR DISCIPLINARY ACTION**

This matter came on for a prehearing conference before Administrative Law Judge Eric L. Lipman on February 15, 2007, at the Minneapolis offices of the Office of Administrative Hearings.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota, 55101-2130, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance on behalf of Schuett General Contractors, Inc. (Respondent). Following a submission from the Department on February 26, 2007, the hearing record closed.

On March 19, 2007, the ALJ issued his Findings of Fact, Conclusions and Recommendation that the Commissioner of Labor and Industry take disciplinary action against Schuett General Contractors, Incorporated. On March 21, 2007 the Commissioner invited the parties to submit any exceptions or arguments they had in the case by April 10, 2007. The Department filed its comments regarding a recommended sanction on March 28, 2007. Respondent did not file exceptions or arguments.

Thereafter, on July 18, 2007, the Commissioner returned the record in this matter to the ALJ pursuant to Minn. Stat. §14.62, subd. 2a, requesting that the ALJ "consider disciplinary action" in this matter. The ALJ invited the parties to submit any further comments regarding sanctions by August 3, 2007. Neither party chose to submit additional comments and the record closed on that date.

Based upon the contents of the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. On March 19, 2007, the ALJ issued Findings of Fact, Conclusions and a Recommendation that the Commissioner of Labor and Industry take disciplinary action against Schuett General Contractors, Incorporated.

2. The Commissioner of Labor and Industry did not issue a final decision within 90 days of the April 10, 2007 close of the record in this case and returned the file to the Office of Administrative Hearings for the purpose of determining appropriate discipline.

### **CONCLUSIONS**

1. Pursuant to Minn. Stat. § 14.62, subd. 2a, the ALJ's March 19, 2007 report in this matter is the final agency decision. That report, which is attached to this Order, is adopted in its entirety and all of the Findings of Fact and Conclusions contained therein are incorporated into this Order.

2. Minnesota statutes section 14.62, subd. 2a requires that the Administrative Law Judge determine the discipline to be imposed in this case.

3. The parties have been given an opportunity to file exceptions and arguments and the record in this matter is closed.

### **ORDER**

#### **IT IS HEREBY ORDERED:**

1. Respondent's Residential Building Contractor's License No. 20221427 is hereby REVOKED.
2. Respondent shall pay to the State of Minnesota a civil penalty of \$10,000.00.

Pursuant to Minn. Stat. § 16D.71(1) and (2) (2006), Respondent is notified that when this order becomes final the agency may file and enforce the penalty imposed as a district court judgment without further notice or additional proceedings.

Dated: August 31, 2007

s/Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

### **NOTICE**

Any person aggrieved by the Findings of Fact, Conclusions and Order in this contested case is entitled to judicial review of the decision under Minn. Stat. §§ 14.63-14.69 (2006). An aggrieved person must file a petition for a writ of certiorari with the Minnesota Court of Appeals and serve it on the Department of Labor and Industry, the Office of Administrative Hearings, all other parties to the proceeding and the attorney general, personally or by certified mail, not more

than 30 days after the aggrieved party receives the final decision and order. Proof of service on the Department of Labor and Industry, the Office of Administrative Hearings, the other parties and the attorney general must be promptly filed with the Office of the Clerk of Appellate Courts and the appeal will thereafter proceed in the manner provided by the Rules of Civil Appellate Procedure.

## MEMORANDUM

This matter comes before the Office of Administrative Hearings pursuant to the requirement in Minn. Stat. §14.62, subd. 2a that, where an agency does not issue a final decision within 90 days after the ALJ issues a report in a matter, the ALJ's report constitutes the final decision in the case and the Office of Administrative Hearings determines the discipline to be imposed. Respondent defaulted at the prehearing conference. The Department's Notice and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges in this matter were properly issued and served upon Respondent. The Notice provided Respondent fair warning that an administrative action had been initiated and that the allegations set forth would be deemed proven if Respondent failed to appear at the prehearing conference without leave from the ALJ. Further, Respondent did not file exceptions or arguments to the ALJ's Findings of Fact, Conclusions and Recommendation.

The Commissioner and the Office of Administrative Hearings are authorized to dispose of this contested case proceeding adversely to any party who is in default.<sup>1</sup> As a result of the Respondent's serial defaults, the allegations in the Department's Notice and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges are taken as true and deemed proven.

The record shows that Respondent, a licensed residential building contractor, failed to pay for services and materials from six different sub-contractors and suppliers. These lapses resulted in judgments against Respondent in the amounts of \$7,560.00, \$34,301.55, \$33,702.00, \$14,000.00, \$40,019.00 and \$40,314.00 – for a total of \$169,896.55. At least four, and perhaps all six, of these judgments have not been paid.<sup>2</sup>

Based upon this record, it is appropriate for the ALJ to issue a civil penalty.<sup>3</sup> Minn. Stat. § 14.045, subd. 3 requires the ALJ to consider the following factors when issuing a civil penalty:

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<sup>1</sup> See, Minn. R. 1400.6000 (2005).

<sup>2</sup> *In the Matter of Schuett General Contractors*, OAH Docket No. 8-1902-17737-2, at 2 and 3 (Attached Order).

<sup>3</sup> See, Minn. Stat. §§ 14.62 (2a) and 45.027 (6) (2006).

(a) If a statute or rule gives an agency discretion over the amount of a fine, the agency must take the following factors into account in determining the amount of the fine:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, and the natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and,
- (6) other factors that justice may require.

As a licensed residential building contractor, Respondent undertook a special duty to be financially responsible and to timely pay subcontractors.<sup>4</sup>

Each of Respondent's failures to pay a supplier or a subcontractor is a separate and serious violation of the applicable standards. The record demonstrates the Respondent's violations were willful and have caused both substantial economic harm and inconvenience to the public.

Further, despite opportunities to cure these earlier violations, Respondent has failed to meet its obligations under applicable statute and rules. Lastly, Respondent has not offered any reasons why the sanctions sought by the Department are not reasonable or warranted.

The Department recommended that Respondent's license be revoked and that a civil penalty of \$10,000.00 be imposed. These penalties are well below the maximum that could be imposed under these circumstances. Moreover, a civil penalty of \$10,000.00 is consistent with the sanctions that have been issued in similar cases where the contractor was involved with purposeful self-dealing.<sup>5</sup>

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<sup>4</sup> See, Minn. Stat. § 326.91 (1)(6) and (1)(12) (2006).

<sup>5</sup> Compare, e.g., *In the Matter of Residential Design Investment Group Corporation*, OAH Docket No. 3-1902-17235-2 (2007) (a civil penalty of \$15,000 was imposed upon a company that engaged in unlicensed residential contractor building activities by using a fraudulent license number and then exceeded its estimated project cost by more than \$100,000) (<http://www.oah.state.mn.us/aljBase/final/190217235.pdf>); *In the Matter of Jeffrey Daniel Martin*, OAH Docket No. 3-1902-17222-2 (2006) (a builder's license was revoked and an \$8,000 civil penalty imposed upon a builder who engaged in residential contracting activities following the expiration of his license, failed to complete a project and did not satisfy a judgment of \$12,805) (<http://www.oah.state.mn.us/aljBase/final/190217222.pdf>); *In the Matter of Ricky Lee Pottebaum*,

Therefore, it is in the public interest to revoke Respondent's license and to impose a civil penalty in the amount of \$10,000.

**E.L.L.**

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OAH Docket No. 3-1902-17021-2 (2006) (a civil penalty of \$3,000 was imposed upon an unlicensed contractor who continued to portray himself as a licensed contractor despite a Cease and Desist Order) (<http://www.oah.state.mn.us/aljBase/final/190217021.pdf>).